# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-278

UNITED STATES OF AMERICA,

*Respondent,*

v.

CHAMPION INTERNATIONAL CORPORATION,

*Petitioner.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, initially filed May 3, 1977, as amended July 20, 1977.

### OPINIONS BELOW

A copy of the unreported opinion of the United States District Court for the District of Oregon entered July 16, 1975 is attached as Appendix A. infra, A1.

The amended opinion of the United States Court

of Appeals for the Ninth Circuit dated July 20, 1977 is not yet reported. A copy is attached as Appendix B, infra, A9.

## JURISDICTION

The judgment of the court of appeals was entered May 3, 1977. Petitioner filed a timely petition for rehearing and a suggestion for rehearing in banc, which was denied on July 20, 1977. A copy of the order denying the petition is attached as Appendix C, infra, A17. An order staying issuance of mandate pending disposition of this petition for writ of certiorari was filed on August 2, 1977, a copy of which is attached as Appendix D, infra, A19. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

The Sherman Act, 15 U.S.C. § 1, declares illegal every "contract, combination . . . or conspiracy, in restraint of trade or commerce . . ." In this criminal case the trial court specifically found the defendants, timber operators with processing plants located adjacent to timber offered for sale by the United States Forest Service, properly discussed with one another each other's interest in upcoming sales without actually committing themselves with respect to any such sales. The trial court further found that a pattern of noncompetitive bidding among the defendant mills was lawfully established and explicable by rational economic behavior. But solely by reason of the continuation of similar bidding concurrent with such discussions the trial court convicted the defendants of an "implied agreement" of uncertain terms, scope and duration relating to the timber sales. The court of appeals, ignoring the trial court's specific findings and treating the case as though it were an appeal from a general jury verdict, affirmed.



The questions presented by this petition are:

1. Can the express provisions of the Sherman Act requiring a "contract, combination . . . or conspiracy" be judicially restated so as to make the mere continuation of lawful parallel conduct a criminal offense as an "implied" or "tacit" "understanding"?

2. Can such an "implied" or "tacit" understanding" be the basis of a criminal conviction absent any evidence or finding of intent by the participants to act in concert?

3. Absent any allegation or finding of substantial effect on interstate commerce, can the jurisdictional reach of the Sherman Act be construed to embrace transactions involving standing timber, which necessarily must be cut and processed within the state, on a theory of "constructive flow" of commerce based upon the buyer's intent eventually to resell the finished products in interstate commerce?

## STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 [1973], 26 Stat. 209 (prior to its amendment by 88 Stat. 1708 and 89 Stat. 801) stated:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or

with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."



## STATEMENT OF THE CASE

### 1. Proceedings in the District Court

Petitioner is the owner and operator of a large number of forest products manufacturing facilities throughout the United States, including a small veneer mill located at Idanha, Oregon, within the Detroit Ranger District of the Willamette National Forest. The Detroit Ranger District is situated in a steep, narrow canyon through which cuts the North Santiam River. Except for respondent's mill and two mills operated by co-defendants, the timber in the canyon is remote from major processing facilities. Accordingly, the three resident mills in the canyon historically have purchased in excess of 95% of the annual volume of timber put up for bid there by the United States Forest Service. During the period preceding mid-1967 one of the mills, Young & Morgan, Inc., significantly expanded its operations and raw material requirements. During this period of Young & Morgan's expansion, the mills experienced a bidding war in which prices for timber sales frequently exceeded three times the Forest Service's appraised value. In mid-1967 this bidding war ended, and between that date and late 1972 relatively few sales on which only the resident mills bid sold for amounts significantly in excess of the appraised value.

On September 9, 1974 the resident mills, together with a number of individual officers and employees, were indicted under Section 1 of the Sherman Act. (A fourth mill operated by Frank Lumber Company utilized primarily hemlock and not the dominant spe-

cie, Douglas fir. Frank Lumber Company also was indicted, but was dismissed on motion at the conclusion of the government's case.) The charging allegations of the indictment, as clarified by the government's bill of particulars, were that commencing with the change in bidding pattern in mid-June 1967, and continuing to the date of the indictment, the defendants entered into a continuing conspiracy (1) to eliminate competitive bidding for United States Forest Service timber, (2) to allocate the timber among themselves, (3) to fix, reduce, and stabilize the price paid for the timber, and (4) to bid up any nonconspirator who attempted to bid on the timber.

The case was tried to the court without a jury. On July 16, 1975, the trial court issued its written opinion, including findings of fact and conclusions of law. The trial judge expressly rejected the Government's principal contention made throughout the trial that the mid-June 1967 shift from a period of intensive bidding to a period of relative peace was the result of collusion. The court expressly found that there was no evidence of any such agreement, and based on the evidence presented, the court concluded that no such agreement had occurred. The trial court further explained that the initial period of noncompetitive bidding "was caused by normal economic forces and was not the result of any conspiracy." Each of the operators knew the timber sales on which one or another neighboring mill would have a competitive advantage by reason of the sale's location, specie mix, logging requirements, and other operating factors. Each of the mills knew that a mill which had a competitive advantage on a sale, or a greater need for a particular sale, could and would bid a higher price for the timber at the time of the oral auction. Each also knew that if it ran up the price on a sale in which another mill had such a competitive advantage, that mill logically would likewise run up the price on sales on which it had the advantage. For these reasons the trial court concluded that the noncompetitive bidding pattern established in mid-June 1967 was natural and explicable by normal economic forces. Although the trial court made no finding one way or the other, the defendants introduced substantial evidence that for the duration of the post-mid-1967 low bidding period, the mills in the canyon experienced an equilibrium in timber supply relative to their mill capacities, as well as an economic depression in the forest products industry end-product price, each of which also tended to contribute to a lack of intensive bidding.



The trial court also made findings of fact with respect to four instances during the period March 1968 through the fall of 1971 in which representatives of the three mills discussed a variety of industry concerns, including their respective probable interests in certain of the upcoming timber sales. With respect to these discussions, the trial court specifically found that no participant committed himself not to bid on any sales, and that the meetings, including discussions about each participant's interest in upcoming sales, were not of themselves illegal. The trial court then held, however, that the combination of these discus-

tern it had previously held was lawfully established in mid-1967, permitted it to reach the legal conclusion that the defendants were guilty, beyond a reasonable doubt, of an "implied agreement."

The trial court further found interstate commerce jurisdiction, despite the fact that the transactions involved standing timber all of which necessarily required cutting and processing within the state, on the theory that the defendants' purchases were made "with the express intent that the end-products they manufactured would continue in the stream of interstate commerce," citing *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1329 (1948).

**2. Proceedings in the Court of Appeals**

Following imposition of sentences involving substantial fines and incarceration for the individual convicted defendants, respondent and its co-defendants appealed to the Ninth Circuit Court of Appeals. In an opinion issued on May 3, 1977, amended July 20, 1977, that court affirmed the convictions. Acknowledging that the government was unable to introduce direct evidence of any express agreement, and ignoring the illogic of the trial court's conclusion of illegality based on discussions and bidding behavior each of which standing alone it had expressly found lawful, the court of appeals conclusorily stated: "Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants 'had an understanding' about bidding."



With respect to interstate commerce jurisdiction, the court of appeals did not comment upon the trial court's theory of "constructive flow" based upon the intent of the purchaser of unsevered raw materials, but assumed a finding of substantial effect on commerce which the trial court had never made, and the indictment had never charged.

Finally, the court of appeals brushed aside the question whether such an "implied" or "tacit" "understanding," if it is to be the basis of a conviction for criminal misconduct, must be shown to have been intentionally and consciously entered into by the participants.

## REASONS FOR ALLOWING THE WRIT

This petition should be granted because it raises important questions of federal law concerning the substantive scope and jurisdictional reach of Section 1 of the Sherman Act which have not been, but should be, settled by this Court.

Although Congress has on several occasions subsequent to the initial enactment of the Sherman Act in 1890 specified particular forms of conduct sought to be proscribed,[1] it has left unchanged the basic language of Section 1 requiring a "contract," "combination," or "conspiracy," all terms requiring conscious and intentional assent to joint action. Both the trial

[1] See, *e.g.*, Clayton Anti-Trust Act, 38 Stat. 730; Miller-Tydings Fair Trade Act, 50 Stat. 693; McGuire Act, 69 Stat. 282; Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1383.

court and the court of appeals acknowledged that there was insufficient evidence, either direct or circumstantial, upon which to base any finding of actual or express agreement among the defendants. Both courts, then, substituted for the specific language of the statute their own subjective and elastic terms of "tacit" or "implied" "understanding." Having thus redefined the offense in amorphous terms, both courts then relied on a strained interpretation of circumstantial evidence upon which to infer the liability. By so doing, the lower courts have impermissibly expanded by judicial construction the clear scope and intent of the statute, and have left businessmen in general, and the forest products industry in particular, exposed to the peril of criminal conviction under a standard unfairly vague and subjective. Not since the sharply divided decision in *United States* v. *Container Corp. of America*, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969), has this Court construed the essential concepts of "contract, combination . . . or conspiracy" as used in the Act; and neither that nor any other opinion of the Court has sanctioned criminal liability for a "tacit" or "implied" "understanding" of the kind involved here.[2]

A dangerous consequence of permitting criminal conviction for an "implied" or "tacit" "understanding"

[2] Prior opinions of this Court have referred to the concept of a tacit agreement, but in the sense of sufficient evidence from which to infer an express agreement consummated without specific verbal or written communication, yet clearly involving consensual joint action. See, *e.g.*, *Theatre Enterprises* v. *Paramount Film D. Corp.*, 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954). In the present case the trial court specifically found no such implied-in-fact express agreement.



based upon an inference drawn from discussions and bidding behavior each in itself lawful, but construed as collusive in combination, is the absence of any finding by the trial court of any knowing or conscious consent to concerted activity by the participants. The opinion of the court of appeals blandly states that the Sherman Act does not require a showing of "specific intent" to restrain trade. But, contrary to the court of appeals' statement of the issue, the Sherman Act, if it is to be the basis of a criminal conviction, must require proof beyond a reasonable doubt that each defendant consciously and intentionally committed to joint action—and not merely engaged in consciously parallel business conduct from which, in retrospect, a trier of fact infers an "implied" or "tacit" understanding." The Sherman Act does not prohibit all noncompetitive business behavior; it only prohibits such behavior when it is the subject of agreement. Whatever may be the evolving common law with respect to "constructive," "implied in law," or "quasi" contracts, imposing civil liability regardless of intent, such doctrines have no place in a criminal prosecution for antitrust conspiracy. This portion of the opinion of the court of appeals is in direct conflict with decisions of other circuits on this issue. See *United States* v. *U. S. Gypsum Co., et al.*, 550 F.2d 115 (3rd Cir. 1977), *petition for writ of certiorari pending* (3rd Cir. 1977); *United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied sub nom. Da Silva* v. *United States*, 416 U.S. 987, 94 S. Ct. 2392, 40 L. Ed. 2d 764 (1974) (separate appeal), *cert. denied sub nom. Purin* v. *United States*, 417 U.S. 930, 94 S. Ct. 2640, 41 L. Ed. 2d 233 (1974) (separate appeal).

Finally, the trial court's "constructive flow" concept of interstate commerce jurisdiction is without any support in decided opinions of this court, and would virtually eliminate any jurisdictional limit to the Sherman Act. *Mandeville Farms*, supra, the sole case relied upon by the district court, although factually parallel, was decided on a wholly unrelated ground. In that case, the court held that the complaint stated a jurisdictional basis because the alleged conspiracy by sugar beet processors to fix prices paid to in-state growers would have a substantial *effect* on subsequent interstate sales of refined sugar. Misapprehending *Mandeville*, the trial court adopted a novel theory that a producer (or buyer) of raw materials which necessarily will require substantial processing within the state can be deemed to have initiated the "flow" of commerce when he acquires the raw materials with a general intent to resell the finished product in interstate commerce. This concept ignores the substantial body of law evolved by this Court with respect to the converse situation—when does the "flow" of interstate commerce end? In *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332, 87 L. Ed. 460 (1943), the court held that interstate commerce ends when goods come to rest with a wholesaler, unless they were purchased with an intent to resell to a specific in-state customer. *And see, Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 39 S. Ct. 237, 63 L. Ed. 517 (1919). The opinion of the court of appeals salvaged jurisdiction by ignoring the trial court's theory of "constructive flow," and assuming a finding of "effect" on



commerce that the trial court never made, for which no competent evidence was offered, and which the indictment never charged. Only this Court can definitely resolve the jurisdictional scope of the Sherman Act with respect to transactions involving raw materials to be severed and processed within the state, previously thought to be beyond the scope of the Act absent proof of a substantial effect on interstate commerce.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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August 17, 1977